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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

HOSEA LATRON SWOPES,	)	Case No.: 1:21-cv-01418-JLT-HBK (HC)
	)	
Petitioner,	)	ORDER ADOPTING THE FINDINGS AND
	)	RECOMMENDATIONS, GRANTING
v.	)	RESPONDENT’S MOTION TO DISMISS,
	)	DENYING PETITION FOR WRIT OF HABEAS
A. CIOLLI, WARDEN,	)	CORPUS, AND DIRECTING CLERK OF
	)	COURT TO CLOSE CASE
Respondent.	)	
	)	(Docs. 1, 8, 17)
	)	

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The assigned magistrate judge issued Findings and Recommendations recommending that Respondent’s Motion to Dismiss be granted, and the Petition be dismissed for lack of jurisdiction. (Doc. 17.) Those Findings and Recommendations were served upon all parties and contained notice that any objections thereto were to be filed within 14 days after service. In addition, the parties were “advised that failure to file objections within the specified time may result in the waiver of rights on appeal.” (*Id.*, citing *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014); *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)). In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the Court has conducted a *de novo* review of the case.

On May 23, 2022, Petitioner timely filed objections to the Findings and Recommendations, which consisted largely of the same argument made in his reply to Respondent’s Motion to Dismiss: that he is actually innocent of the career offender enhancement

1 under 18 U.S.C. § 924(e) because his predicate offense of unlawful use of a weapon by exhibiting  
2 under Missouri law does not “require the targeted use of force intentionally designed to [sic]  
3 injury another person,” and therefore does not qualify as a violent felony based on recent the  
4 Supreme Court holding in *Borden v. United States*, 141 S.Ct. 1817 (2021). In his objections,  
5 Petitioner specifically contends that *Borden* “established that the force clause ‘excludes conduct,  
6 like recklessness, that is not directed at [sic] targeted at another.’” (Doc. 18 at 2-3.) However, the  
7 precise holding in *Borden* was that criminal offenses “with a *mens rea* of recklessness do not  
8 qualify as violent felonies under ACCA.” *Borden*, 141 S.Ct. at 1834. Under the Missouri statute  
9 at issue here, “a person commits the offense of unlawful use of weapons, . . . if he or she  
10 knowingly exhibits, in the presence of one or more person, any weapon readily capable of lethal  
11 use in an angry or threatening manner.” Mo. Rev. Stat. § 571.030.1(4)(emphasis added).

12 Petitioner does not argue, nor does the Court discern, that his conviction for unlawful use  
13 of a weapon by exhibiting under Missouri law required only a *mens rea* of recklessness; rather,  
14 the *mens rea* for an exhibiting offense is knowledge. See *United States v. Robinson*, 29 F.4<sup>th</sup> 370,  
15 377 (7th Cir. 2022) (“The *mens rea* for Illinois’s aggravated-discharge offense is knowledge, not  
16 recklessness. *Borden*, it follows, is irrelevant to [Petitioner’s] status, because his predicate violent  
17 offense was not a reckless crime.”); *United States v. Jackson*, 30 F.4<sup>th</sup> 269, 275-76 (5th Cir. 2022)  
18 (predicate conviction for aggravated robbery required a *mens rea* higher than recklessness and  
19 therefore qualifies as violent felony for ACCA purposes); Cf. *United States v. Hoxworth*, 11 F.4<sup>th</sup>  
20 693, 696 (8th Cir. 2021) (“Given that Texas’s version of aggravated assault criminalizes  
21 ‘recklessly caus[ing] bodily injury,’ there is no question that Hoxworth’s crime does not count as  
22 a violent felony under *Borden*.”). Thus, *Borden*’s holding has no relevance to the Court’s  
23 consideration of whether Petitioner is actually innocent of his career offender status based on his  
24 Missouri conviction for unlawful use of a weapon by exhibiting.

25 Finally, to the extent Petitioner re-argues in his objections to the Findings and  
26 Recommendations that his conviction for exhibiting does not satisfy the “force clause” because  
27 “exhibiting does not ever require the targeted use of force intentionally designed to [sic] injury  
28 another person,” the Eighth Circuit specifically affirmed the district court’s finding that

1 Petitioner’s conviction for unlawful use of a weapon qualified “categorically” as a violent felony  
2 under § 924(e) because it “has as an element the use, attempted use, or threatened use of physical  
3 force against the person of another.” (Doc. 18 at 2-6; Doc. 17 at 6.); *See United States v. Swopes*,  
4 892 F.3d 961, 962 (8th Cir. 2018). For this reason, Petitioner’s citation to *Allen v. Ives*, 950 F.3d  
5 1184, 1188-89 (9th Cir. 2020), is unhelpful, as that case concerned a petitioner who claimed a  
6 prior conviction did not qualify as a predicate offense – a claim that is foreclosed here by the  
7 Eighth Circuit’s 2018 *Swopes* decision. Thus, having carefully reviewed the entire file, including  
8 Petitioner’s objections, the Court concludes that the magistrate judge’s Findings and  
9 Recommendations are supported by the record and proper analysis.

10 Based upon the foregoing, the Court **ORDERS**:

- 11 1. The Findings and Recommendations issued on May 11, 2022, (Doc. 17), are  
12 **ADOPTED** in full.
- 13 2. Respondent’s Motion to Dismiss (Doc. 8) is **GRANTED**.
- 14 3. The petition for writ of habeas corpus (Doc. 1) is **DENIED**.
- 15 4. The Clerk of the Court is directed to **CLOSE THIS CASE**.

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17 IT IS SO ORDERED.

18 Dated: June 24, 2022

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UNITED STATES DISTRICT JUDGE